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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 49

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California,

Appellants,

vs.

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida Corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division

BRIEF FOR APPELLANTS

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OPINION BELOW

The opinion of the United States District Court for the Northern District of California, Northern Division, is reported in 197 F. Supp. 780 (1961).

JURISDICTION

Handlers'[1] action was brought under 28 U.S.C. 1331 and 1345 to enjoin appellant state officers[2] from enforcing California Agricultural Code, Section 792, as unconstitutional and as being in conflict with federal statute. R. 1. Final judgment dismissing handlers' action was entered in the district court on September 22, 1961, and state officers' direct appeal was timely filed in that court on November 3, 1961. 28 U.S.C. 2101(b). R. 222, 223. Handlers' complaint poses the issue of the constitutionality of the state statute under the three-judge district court procedure under 28 U.S.C. 2281, and this Court has appellate jurisdiction over state officers' direct appeal under 28 U.S.C. 1253. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73 (1960). R. 1. Probable jurisdiction was noted by this Court on January 15, 1962, 368 U.S. 965.

STATUTES INVOLVED

California Agricultural Code, Section 792, provides:

> "Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

[1] Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., hereafter referred to as "handlers."

[2] Charles Paul, Director of Agriculture, Edmund G. Brown, Governor, and Stanley Mosk, Attorney General, hereafter referred to as "state officers."

"'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

Pertinent provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 68 Stat. 906, 7 U.S.C. 608(c), et seq. are set forth in the Appendix.

QUESTION PRESENTED

Whether the district court erred in entering judgment dismissing the action on the merits instead of dismissing for want of equity jurisdiction?

STATEMENT

Handlers are Florida corporations. R. 554. Their complaint sought injunction restraining state officers from enforcing California Agricultural Code, Section 792, on the ground of its invalidity under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended 68 Stat. 906, and as unconstitutional under the Commerce Clause and under the Equal Protection Clause of the 14th Amendment of the Constitution. R. 1.

No officer or employee of either handler testified at the trial held February 7 and 8, 1961. R. 557-685. Instead, handlers' case consisted of the production of one witness, Paul Louis Harding, Supervisory Plant Physiologist, United States Department of Agricul-

ture, whose testimony related to the palatability and maturation of the avocado fruit. R. 558-622. Handlers at the trial also offered in evidence *en masse*, and without reading, the complete deposition transcripts of five witnesses, totaling 207 pages, together with attached exhibits of 92 pages. R. 144-445 (O.P.); R. 576 (O.P.).[3] The state officers objected and asked that the depositions be read question and answer at a time, and exhibits offered individually, in order that specific objections could be made. R. 576. These objections were renewed at the conclusion of the handlers' case (R. 625) and again at the conclusion of the trial (R. 683-684). The trial court reserved ruling on the admissibility of the depositions and exhibits pending the filing of the written argument of counsel. R. 576, 625, 683-684.

In a post trial formal order, the trial court ruled on these reserved objections and held that the handlers' depositions and their attached exhibits were excluded from evidence. R. 782.

The district court found that California's maturity standard requiring a minimum of 8 percent of oil is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California. R. 779. These hybrid and Guatemalan varieties, which constitute approximately 88 percent of total Florida commercial shipments, exceed 8 percent oil content while in a prime commercial marketing condition. R. 780, 517.

[3] Testimony and exhibits not admitted into evidence but included in the record as an offer of proof, are designated R. ___ (O.P.).

The court also found that West Indian varieties grown in Florida are of declining commercial importance, dropping from approximately 20 percent of total Florida commercial shipments in the 1955-56 shipping season to approximately 12 percent in the 1959-60 shipping season. R. 780. Moreover, the Florida West Indian varieties have such poor shipping qualities and short retail grocery store shelf-life, that shipment across the continent for marketing in California is not commercially feasible, even in the absence of the California 8 percent oil content statute. R. 780, 666-667.

Handlers made no attempt to market their Florida avocados in California in the business years ending March 31, 1959, and ending March 31, 1960, and there was no proof of any attempt to market their avocados in California from March 31, 1960, to the date of trial, February 7, 1961. R. 780. On these facts, the district court found that handlers "have neither suffered nor been threatened with irreparable injury," and concluded as a matter of law that handlers' evidence failed to establish a case within its equity jurisdiction. R. 781.

In its memorandum decision, the district court stated:

> "If the instant case were before this Court for the first time, the Court would decline to take equitable jurisdiction, on the showing made by plaintiffs. (See: *Watson* v. *Buck*, 313 U.S. 387; *A.F. of L.* v. *Watson*, 327 U.S. 582)." 197 F.Supp. 780, 784.

Nonetheless, the district court exercised its equity jurisdiction because it considered itself under a mandate from this Court to decide the case on the constitutional merits.

This Court in the previous appeal held that handlers' complaint alleged facts showing the existence of "a justiciable controversy which appellants are entitled to have determined on the merits." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85-86. Because of the district court's conclusion that this language left it no discretion to decline equitable jurisdiction, the district court reached the merits of the posed constitutional issue. 197 F. Supp. 780, 784.

On the merits, the district court held that the state enactment was constitutionally valid under the Commerce Clause and under the Equal Protection Clause of the 14th Amendment. R. 781. The California act was also found to be consistent with the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. 608(c), and with the implementing marketing regulations for avocados grown in South Florida issued by the Secretary of Agriculture. 7 C.F.R. Pt. 915. R. 15. Handlers' action was therefore dismissed on the merits by formal judgment entered September 22, 1961. R. 783-784.

SUMMARY OF ARGUMENT

A. Handlers are Florida corporations who market avocados grown in South Florida. No evidence was adduced by them at the trial which would show that the California 8 percent avocado oil content standard

had ever interfered with their marketing operations in California. As the district court held, handlers have neither suffered nor been threatened with irreparable injury and their evidence failed to establish a case within that court's equity jurisdiction. Having found a lack of equity jurisdiction, the district court should not have reached the constitutional issues posed in handlers' complaint. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97 (1935); *Douglas* v. *Jeannette*, 319 U.S. 157, 162-165 (1943).

B. The district court erred in assuming that this Court's remand from the previous appeal left the district court ". . . no discretion to decline equitable jurisdiction. . . ." 197 F. Supp. 780, 784. This Court in the previous appeal decided only that there was a justiciable case or controversy which gave the district court jurisdictional power to hear the case; this Court did not decide any other questions which could arise in the further progress of the litigation, including the question whether the district court should, as a matter of discretion, decline to exercise its equity jurisdiction. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 86 (1960). The question whether handlers' case fell within the equity jurisdiction of the district court remained, after remand, a part of the existing dispute between the parties which required resolution by the district court.

C. Neither state officers nor handlers in the questions presented set forth in their jurisdictional statements, October Term, 1962, Nos. 45 and 49, ques-

tioned the evidenciary rulings of the district court. Handlers may not, therefore, question the correctness of these rulings on appeal. Rule 40(2), Revised Rules, Supreme Court of the United States; *General Talking Pictures* v. *Western Electric Co.*, 304 U.S. 175, 177-178 (1938). In any event, the lower court correctly excluded from evidence handlers' depositions of five witnesses and the attached 22 exhibits. These depositions were offered in evidence *en masse* and without reading by handlers, and with no foundation having been laid justifying their admission under the Federal Rules of Civil Procedure. R. 576; 144-445 (O.P.).

ARGUMENT

I. HANDLERS' ACTION SHOULD HAVE BEEN DISMISSED UPON THE GROUND THAT IT FAILED TO ESTABLISH A CASE WITHIN THE EQUITY JURISDICTION OF THE DISTRICT COURT.

A. Handlers' Evidence Failed to Establish the Exceptional Circumstances Showing That an Injunction Against State Officers Is Necessary to Afford Adequate Protection of Constitutional Rights.

Handlers complain that the California avocado maturity statute as applied to them is invalid by reason of the paramount provisions of the Constitution and of federal statute. But there was a complete failure of proof showing that the California avocado maturity law had ever caused injury or otherwise violated their rights. Neither did handlers show that their marketing operations came within the federal avocado marketing regulations. Handlers' case in

chief consisted solely of the testimony of one witness whose statements described the maturation and palatability of the avocado fruit. R. 558-622. The nature of handlers' injury and the scope of the official conduct challenged, remain shrouded in uncertainty. On this record, handlers have not shown themselves to be immediately harmed, or immediately threatened with harm. The findings of the district court, that handlers ". . . have neither suffered nor been threatened with irreparable injury"; and their ". . . evidence fails to establish a case within the equity jurisdiction of this [District] Court" were therefore manifestly correct. R. 780-781. Indeed, handlers conceded this to be true since they did not contest the correctness of these findings in the questions presented set forth in their jurisdictional statement filed in No. 45, of the 1962 term of this Court.

Neither party in their questions presented has challenged the evidenciary ruling of the district court excluding from evidence handlers' depositions and attached exhibits. Therefore, there is no issue on the appeal to which the contents of these excluded depositions and exhibits would be relevant. But even if considered as an offer of proof, their contents may not be considered on appeal for the purpose of deciding on the merits whether the evidence supports the findings of the district court that handlers ". . . have neither suffered nor been threatened with irreparable injury." R. 780. *Idaho and Oregon Land Co.* v. *Bradbury,* 132 U.S. 509, 518 (1889). To do so

would prejudice the right of state officers, specifically reserved by the district court, to introduce rebuttal evidence in the event it was decided on appeal that the district court prejudicially erred in excluding these depositions and exhibits from evidence. R. 782.

Lastly, even if they were properly before the Court, these depositions and exhibits would fail to establish a case within the equity jurisdiction of the district court. Handler Florida Lime and Avocado Growers, Inc., was incorporated in Florida on April 6, 1956 (R. 554) and marketed avocados in California during the 1956-1957 and 1957-1958 shipping seasons R. 443 (O.P.).[4] The *only* interference by the California authorities with these marketing operations occurred with respect to one lot of avocados in November of 1957, on which no loss is claimed by this handler. Pl. Ex. 21 for id., R. 444 (O.P.); R. 782. Handlers' gross avocado sales during these two years were $443,316.55. D. Ex. B, R. 124, 643, 688; D. Ex. C., R. 550, 643, 688.

Handler South Florida Growers, Inc., was incorporated in Florida on April 29, 1953 (R. 554), and marketed avocados in California during the 1954-1955, 1955-1956, 1956-1957 and 1957-1958 shipping seasons. Pl. Ex. 17 for id.; R. 438 (O.P.); R. 782. During these years 34,905 bushels of avocados were shipped into California, of which 641 bushels, or 1.84 percent, were transshipped out of the State for sale in other markets

[4] The earlier 1955 shipments by a predecessor co-operative corporation, which is not a party to this action, as shown by handlers' Exhibit 21 for identification, are not relevant to any issue in the case. R. 443 (O.P.).

after failing to pass the 8 percent oil test. Pl. Ex. 17 for id.; R. 438 (O.P.); R. 782. These transshipments resulted in a claimed reduction in gross income during these years of $1,587. Pl. Ex. 17 for id.; R. 438 (O.P.); R. 782. This figure amounts to but an infinitesimal part of this handler's gross avocado sales during these four years of $3,793,919.75. D. Ex. A, R. 120, 643, 688; D. Ex. D, R. 551, 643, 688.

Of all avocados shipped into California by these handlers, over 96 percent passed the 8 percent oil standard and were freely marketed in California. Pl. Ex. 17, 19, 20, 21, all for id.; R. 438, 441, 442, 443 (O.P.); R. 782.

All of handlers' marketing operations in California occurred prior to January 5, 1959, when appellant Edmund G. Brown took office as Governor of California and appellant Stanley Mosk was sworn in as Attorney General, and prior to February 1, 1961, when appellant Charles Paul became Director of Agriculture. R. 778-779. No facts showing interference by any of these officers appear in the record. No threat of interference with the rights of handlers appears beyond that implied by the existence of the California statute and regulations. And, of course, any state court action by state officers against handlers would be subject to review in this Court of any federal questions involved.

"[F]ederal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm by the

challenged action." *Poe* v. *Ullman*, 367 U.S. 497, 504 (1960); see also *Stearns* v. *Wood*, 236 U.S. 75, 78 (1914). A plaintiff asking a federal court to disturb the delicate balance of federal-state relations by restraining state officers from performing their official duty must pass a "strict test" of injury. *American Federation of Labor* v. *Watson*, 327 U.S. 582, 593 (1946). To justify such interference, there must be proof that this is one of those "exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." *Douglas* v. *Jeannette*, 319 U.S. 157, 163 (1943).

On a record showing no injury of any consequence, the district court correctly held, as a matter of law, that handlers had failed to establish a case within the equity jurisdiction of the court. R. 781. But the district court erred in proceeding further to decide the constitutional issues on their merits. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97 (1935); *Douglas* v. *Jeannette*, 319 U.S. 157, 162-165 (1943). In doing so the court decided constitutional issues when it was unnecessary to do so, permitted constitutional questions to be raised by a litigant who has only a hypothetical interest in its outcome, and decided constitutional questions of major importance, which upon the facts in evidence, were not presented for decision. The district court thereby departed from the salutory judicial policy of strict necessity in disposing of constitutional issues. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-571 (1947); *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97 (1935).

B. The Issue of Equity Jurisdiction Was Open for Decision by the District Court.

The district court, although deciding that handlers' case lacked equity, proceeded to decide the constitutional question because in its view the remand from the previous appeal left it " . . . no discretion to decline equitable jurisdiction. . . ." 197 F. Supp. 780, 784. But the record shows that the issue of equity jurisdiction was open for decision by the district court.

State officers originally moved in the district court that handlers' complaint be dismissed on the ground, among others, that no case in equity had been established. R. 60, 98. After hearing, the district court dismissed on the ground that it had no jurisdiction to decide the case because of the absence of a justiciable case or controversy. R. 125. The memorandum decision of the trial court made it clear that its disposition of the case prevented it from considering whether equity jurisdiction existed: "Since this case must be dismissed because of a lack of jurisdiction, it is unnecessary to consider defendants' motions to dismiss." *Florida Lime Growers* v. *Jacobsen*, 169 F. Supp. 774, 776 (1958). On direct appeal to this Court, the issues were whether handlers' complaint established a case or controversy within the jurisdiction of the district court, and whether appellate jurisdiction existed in this Court to hear the direct appeal. Therefore, this Court in its previous decision in this case did not consider or decide all the questions which might arise in

the further progress of the litigation. It decided only that the district court had committed error in holding that handlers' complaint presented no justiciable case or controversy and reversed with the direction that "the cause is remanded to the district court for further proceedings not inconsistent with this opinion." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 86 (1960). The question decided, and laid to rest, was that on the basis of the allegations of the complaint, "there is an existing dispute between the parties as to prevent legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." 362 U.S. 73, 85-86. Therefore, the question whether handlers' case fell within the discretionary equity jurisdiction of the district court was not passed upon by either that court, or by this Court. This issue remained a part of the "existing dispute" between the parties which was still before the court below for resolution after remand.

C. The Evidenciary Rulings of the District Court May Not Be Considered on Appeal But in Any Event Are Correct.

The jurisdictional statement filed by state officers agrees to the correctness of the ruling of the district court excluding from evidence handlers' depositions of witnesses, Biggar, Harkness, Kendall, Piowaty and Wimbish, and excluding from evidence handlers' exhibits for identification 1 to 26. R. 782. Jurisdictional Statement, *Paul* v. *Florida Lime Growers,* Supreme Court of the United States, October Term, 1962, No.

49. Similarly, the questions presented in handlers' jurisdictional statement filed in the companion appeal do not fairly comprise the question of the evidenciary rulings of the trial court. Jurisdictional Statement, *Florida Lime Growers* v. *Paul,* Supreme Court of the United States, October Term, 1962, No. 45, pp. 4-5. Handlers, therefore, may not question on appeal the correctness of the evidenciary ruling of the district court. Rule 40(2), Revised Rules, Supreme Court of the United States; *General Talking Pictures* v. *Western Electric Co.,* 304 U.S. 175, 177-178 (1938); *Roth* v. *United States,* 354 U.S. 476, 490, fn. 27 (1957).

Instead, handlers argue that these depositions and attached exhibits were admitted into evidence. Handler's Brief In Opposition, October Term, 1962, No. 45, pp 4-6. The refutation of this contention requires a review of the proceedings below. Handlers at the trial attempted a *tour de force* in seeking both to prevent cross-examination of any of their officers, and to prevent consideration at the trial of state officers' objections to handlers' depositions of these officers and the accompanying exhibits. Cross-examination was prevented by simply failing to call any of handlers' officers or employees as witnesses. R. 558-624.

Handlers and state officers had stipulated in writing that handlers might take certain depositions in Florida and

> ". . . that said depositions when taken may be read and used in evidence . . . subject to the same

objections and exceptions as if the said witness were personally present on the stand. . . ." Stipulation of Counsel, dated Jan. 9, 1958, Attached to Transcript of Depositions, set forth in the original record herein.

In order to avoid the hearing of state officers' objections to the depositions, handlers made no offer to read the transcripts into evidence, but instead offered the lengthy depositions and attached 22 exhibits into evidence *en masse*. R. 576. The following proceedings then occurred:

Mr. Fourt, counsel for state officers: "We object, your Honor, and we respectfully ask permission and request they be read in order that we may make objections to the testimony. We have a written memorandum prepared outlining objections to each proposed item. We have objections to many of the answers as being hearsay."

Judge Goodman: "We will mark—do you wish to have the depositions marked?"

Mr. Ferguson, counsel for handlers: "Yes, your Honor."

Judge Goodman: "We will mark the depositions in evidence and we will reserve ruling on the objections that you have filed when we have had a chance to examine them." R. 576.

Mr. Fourt: "Thank you very much."

Judge Halbert: "In other words, all objections will be reserved."

Judge Goodman: "All objections will be reserved." R. 576.

Subsequently, handlers had Exhibits 23, 24, 25 and 26 marked for identification. R. 576, 583. These exhibits, consisting of reprints from magazines and other research studies on avocados, were then offered in evidence, with the court reserving its ruling on their admissibility. R. 603.

At the conclusion of handlers' case, the state officers made inquiry as to whether handlers' Exhibits 1-26 for identification had been offered in evidence and received the reply of Judge Goodman: "They have been offered in evidence but we have reserved the ruling on them." R. 625. At the conclusion of the trial, state officers renewed their objections: "We would have testimony, then, your Honor, to produce if any of the matters in the depositions are to be admitted into the record, and any of those documents. We feel if is a material prejudice here, and we ask that the depositions be read, and we be allowed to enter our objections." R. 684. Judge Goodman then stated ". . . We have told you that your objections stand to every word that is in these depositions here . . ." (R. 684.) ". . . They are all in evidence subject to your objections and the Court will rule on them when it makes its rulings in the case. . . ." R. 685.

The district court having had the transcript of the oral testimony before it, confirmed in its memorandum opinion that it had "reserved its ruling" on the admissibility of handlers' depositions and exhibits. R. 758. 197 F. Supp. 780, 782. Their contents were ex-

amined "arguendo," (by way of argument only, 2 Bl. Comm. 238) to test the strength of handlers' constitutional attacks on the state statute. The memorandum opinion concluded with the direction that state officers prepare findings, a form of judgment ". . . and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum. . . ." 197 F. Supp. 780, 788. Pursuant to this direction, the district court entered its formal written order which recited that "The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish are not admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;" and that "Plaintiffs' exhibits for identification 1 through 26, are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs;" R. 782. This order further reserved to state officers "the right to introduce rebutting evidence at a further hearing should it be determined on appeal and remand that the plaintiffs' [handlers'] offer of proof should have ben admitted into evidence. R. 782.

As noted, the district court in its memorandum opinion stated that it was not ruling "on the objections made by defendants [state officers] to plaintiffs' [handlers'] evidence *on which the Court has reserved its ruling* . . . We will assume, arguendo, that the exhibits and depositions offered by plaintiffs are all admissible." (emphasis added). 197 F. Supp. 780, 782.

From this statement, handlers argue that the district court did not rule on the objections of state officers which were therefore "in effect overruled." Handlers' Brief in Opposition, *Florida Lime* v. *Paul*, October Term, 1962, No. 45, pp. 5-6. This argument fails for two reasons: First, the relevant question is whether *handlers'* depositions and attached exhibits were admitted into evidence. Clearly, they were not admitted into evidence since the memorandum opinion shows that the district court "reserved its ruling" on the admissibility of handlers' evidence (197 F. Supp. 780, 782), and its formal order explicitly excluded these depositions and exhibits from evidence. R. 782. If these evidenciary rulings were correct, then it is irrelevant whether the district court agreed or disagreed with the legal arguments underlying state officers' objections. The memorandum opinion clearly provided that formal orders and judgments conforming to the opinion were to be prepared for subsequent entry by the trial court. 197 F. Supp. 780, 788. And it is presumed that the formal order holding handlers' depositions and exhibits inadmissible, conformed to the earlier written memorandum opinion. Secondly, the memorandum opinion cannot be used to impeach and annul the formal ruling on the admissibility of the evidence, the findings, or the judgment. See *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-395 (1948), in which the Court held that a memorandum opinion discussing a portion of the evidence and giving the district court's reasoning did not constitute

the formal findings required under former Federal Equity Rule 70½, now Rule 52(a), Federal Rules of Civil Procedure. See also Rule 21, Rules for the United States District Court, Northern District of California.* It is the principle of law as applied to the facts which is reviewed on appeal, not the reasons given by the lower court for its decision. *Parks* v. *Turner*, 12 How. 39, 47 (1851).

Handlers also suggested in their Brief In Opposition filed in the companion appeal, October Term, 1962, No. 45, page 5, that these depositions and attached exhibits became evidence in the case because state officers made reference to them in the original motions to dismiss made in the district court. R. 61, 99; *Florida Lime Growers* v. *Jacobsen*, 169 F. Supp. 774, 776, reversed 362 U.S. 73. Such reference in the moving papers was proper since the district court may inquire by affidavit, deposition and otherwise, into the facts as they exist when the question of its jurisdiction is raised. *Land* v. *Dollar*, 330 U.S. 731, 734, fn. 4 (1947). But state officers' concessions made in their motions to dismiss were made only for the purpose of questioning the equity jurisdiction of the district court, and were not intended to be a waiver on the merits of the questions of fact placed in issue by state officers' answers. R. 527, 785. The rule in analogous cases is that such concessions are provisional only.

* Rule 21, "Where written order of judgment is to be prepared by counsel and settled, no memorandum of decision or opinion or any minutes made by the clerk of the court's decision shall constitute entry of judgment under said [Federal] Rules [of Civil Procedure]."

M. Snower & Co. v. *United States*, 140 F. 2d 367, 370 (1944) (motion for judgment on the pleadings); *Begnaud* v. *White*, 170 F. 2d 323, 327 (1948) (motion for summary judgment); *Prepo Corporation* v. *Pressure Can Corporation*, 234 F. 2d 700, 703, cert. denied, 352 U.S. 892 (1956) (motion for summary judgment). In short, handlers cite no authority, nor has any precedent been found, to support the assertion that state officers waived their evidenciary objections by the filing of a motion to dismiss.

In any event, the district court correctly decided these evidenciary questions against handlers who carry the burden of showing that these rulings were prejudicially erroneous. *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943). At the trial, counsel for handlers suggested that consideration of state officers' evidenciary objections be deferred for post trial determination saying: "My suggestion is that questions of relevancy and materiality of this [deposition] evidence and the Exhibits 1 to 22, inclusive, can better be considered by the Court in the arguments of the case, and if this includes questions of admissibility they can be argued to the Court . . . I am not asking counsel [for state officers] to waive any objections." R. 646. Handlers thereby agreed to the reservation by the district court of "all objections" by state officers, including objections of admissibility, to the depositions and exhibits offered in evidence by handlers. R. 576, 603, 625, 646, 682, 683, 685.

State officers thereafter made specific objections to this proffer of evidence (R. 700-729) which are sum-

marized in the Appendix at pages 27 to 46. State officers in particular pointed out that handlers had offered in evidence the depositions of five witnesses with 22 attached exhibits as the principal part of their case without establishing the foundation required by Rule 26(d), Federal Rules of Civil Procedure.[6] R. 700-702.

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These depositions and exhibits were offered as affirmative evidence and not for the purpose of impeachment.

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[6] Rule 26(d) provides:

"(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

"(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

"(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

"(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

R. 576. Since the deponents were either officers of handlers (Kendall and Piowaty), or persons in the employ of neither party (Biggar, Harkness, Wimbish), their testimony could not come in under Rule 26(d)(2).

Handlers failed to lay the requisite foundation for use of the depositions under Rule 26(d)(3). No showing was made that either (1) the witnesses were dead; (2) that the witnesses were at a greater distance than 100 miles from Sacramento, California, or were out of the United States; (3) the witnesses were unavailable because of infirmity or imprisonment; (4) that the witnesses' attendance could not have been secured by subpoena, or (5) that exceptional circumstances existed which excused the presentation of the testimony of these witnesses orally in open court.[7] In fact, handlers didn't even ask the court to make such findings during the trial and made no motion for new trial after judgment. Under these facts, the district court did not abuse its discretion in excluding these five depositions and 22 attached exhibits from evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below be modified to provide that the action be dismissed for failure of handlers

[7] Handler corporations presumably had it within their means to produce their own chief officers, i.e. Kendall, President of South Florida Growers Association, Inc. (R. 251 (O.P.)); Piowaty, Secretary, Florida Lime and Avocado Growers, Inc. (R. 314 (O.P.)). *Vercilstad v. Flynn*, 9 CA, 230 F. 2d 695, 702, cert. denied, 352 U.S. 827 (1956).

to establish a case within the equity jurisdiction of the district court, and that, as modified, the judgment be affirmed. See *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97.

Respectfully submitted,

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APPENDIX

I. The Applicable Portions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as Amended 68 Stat. 906, 7 U.S.C. 608(c), et Seq., Provide:

608c. Orders regulating handling of commodity.

(1) Issuance by Secretary.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601–604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f–612, 613, 614–619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable.

Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof . . . fruits . . . .

(8) Orders with marketing agreement.

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is

known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

* * * * *

(10) Manner of regulation and applicability.

No order shall be issued under this section unless it regulates the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in a marketing agreement upon which a hearing has been held. . . .

(11) . . .

(B) Except in the case of milk and its products orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy. . . .

§610(i) Cooperation with State authorities, importing information.

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f—612, 613, 614—619, 620, 623, and 624 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: . . .

II. State Officers' Objections to Handlers' Proffer of Depositions and Attached Exhibits.

A. THE DISTRICT COURT CORRECTLY EXCLUDED HANDLERS' EXHIBITS 17 AND 21 FOR IDENTIFICATION FROM EVIDENCE.

Handlers' Exhibits 17 and 21 for identification consist of two typewritten documents headed "Avocado Shipments Barred from Sale in California." R. 438, 443 (O.P.); R. 576, 782. Exhibit 17 for identification summarizes seven transactions, each purporting to reflect the shipping of a lot of avocados to California, by handler South Florida Growers Association, Inc., the rejection of the lot in California upon test of oil content, their reshipment and sale outside the State of California, and the resulting lessening of expected gross returns. R. 438 (O.P.). Exhibit 21 for identifica-

tion similarly reflects five shipments of avocados to California by handler Florida Lime and Avocado Growers, Inc. R. 443 (O.P.). State officers objected to their admission into evidence on the grounds (1) that the documents constituted inadmissible hearsay, (2) inadmissible secondary evidence of the contents of other writings, and (3) were irrelevant. R. 720-721.

The statements in these documents, being in writing, were not made in the presence of the district court, nor were they even made in the presence of the officer taking the depositions. R. 263-265, 318-319 (O.P.). Since these documents consist of extrajudicial declarations offered in evidence to prove the truth of the matter asserted, they constitute inadmissible hearsay. *Donnelly* v. *United States*, 228 U.S. 243, 273 (1913). The vice of the hearsay evidence exemplified by handlers' exhibits is that the declarations are made without the sanction of an oath, without responsibility on the part of the declarant for error or falsification, and without opportunity for the court or the parties to test the accuracy and veracity of the declarant by cross-examination. Id. 228 U.S. 243, 273.

These exhibits are not true summaries of records of handlers' business operations, but rather are carefully selected excerpts which have been drawn together for purposes of litigation. Since the handlers' business is the marketing of fruits and vegetables, not litigation, the documents in question were not made in the regular course of their business. Since they were not made in the regular course of business, these

documents do not come within the business records exception to the hearsay rule set forth in 28 U.S.C. 1732. *Palmer* v. *Hoffman,* 318 U.S. 109 (1943).

It is true that handlers had with them at the time the depositions were taken, copies of bills of lading issued by a common carrier, a statement of account rendered by the California consignee, and a copy of a certificate of inspection from the federal-state inspection service. R. 263-265, 318-319 (O.P.). However, none of these documents, which were not made by handlers, were authenticated, nor were they even marked for identification. Their contents were inadmissible hearsay since declarants were not under oath nor available for cross-examination. Therefore, a summary of their hearsay statements in handlers' Exhibits 17 and 21 for identification obviously constitutes inadmissible hearsay. The district court, therefore, was plainly correct in excluding these exhibits from evidence.

B. HANDLERS' EXHIBIT 16 FOR IDENTIFICATION WAS PROPERLY EXCLUDED FROM EVIDENCE.

1. Handlers' Exhibit 16 for identification consists of numerous pages of avocado oil test determinations made at the University of Florida Sub-Tropical Experiment Station, Homestead, Florida. R. 389 (O.P.); R. 576, 782. Tests were made by a Mrs. McKee and a Mrs. Kelp. R. 228-229 (O.P.). The witness Harkness was present during only a few of these tests. R. 229 (O.P.). State officers objected to the introduction of this exhibit into evidence on the grounds (1) that

there had been no foundation laid showing the accuracy of the oil testing method used, and (2) that the exhibit was irrelevant to the issues in this case since no foundation had been laid showing that the avocados tested were mature edible avocados, or that they met the federal weight-size requirements. R. 702-712.

2. Handlers' witness Roy W. Harkness testified that a series of oil content analyses were made on Florida avocados at handlers' request. R. 219 (O.P.). These analyses were made out of court and without notice to state officers. The vice of this class of experimental evidence is that its use allows a party to manufacture evidence in its own behalf. Thus, for example, a slight change in the conditions under which the experiment is made, or in the equipment used, will so distort the result as to wholly destroy its value as evidence.

Handlers' Exhibit 16 for identification consisted of oil tests made by Mr. Harkness on Florida orchard-run avocados from July 6, 1953, through January 16, 1957. See testing dates, Handlers' Ex. 16 for ident.; R. 389-437 (O.P.). On direct examination, Mr. Harkness testified:

> "Q. What method did you use to test the oil content?
>
> "A. We used exactly the method used in California, with the hallowax oil and the shaker bomb.
>
> "Q. What equipment did you use?
>
> "A. We used the shaker bomb, and we used the refractometer for getting the refractive index,

and also miscellaneous laboratory equipment." R. 210-211 (O.P.).

However, on cross-examination, Mr. Harkness admitted that a method *other* than the prescribed California oil test had been used:

"Q. Doctor, in your oil tests, which appear to have been made from 1953 to date, what type of oil tests did you utilize?

"A. It was essentially the method used in California. *We modified the method slightly, so as to avoid using the shaker machine which they use.*" (Emphasis added.) R. 243 (O.P.).

Handlers do not challenge the state-prescribed avocado oil testing method used in California. R. 630. Indeed, handlers cannot, because the state ball-grinder oil test method, prescribed by California regulation, has been standardized against the scientifically accepted ether oil extraction method and its reliability thus assured. Bulletin of the California Department of Agriculture, Volume XLIV, No. 1, page 1, and 3 California Administrative Code, Section 1397.5. R. 90, 93. Photographs of the state-prescribed ball-grinder, and of the Waring Blendor, used by handlers' witness Mr. Harkness, are shown in the record on pages 749-750.

No foundation was laid showing that the "modified" oil test method used by handlers in which a household mixer is substituted for the California ball-

grinder equipment produced an accurate measurement of oil test.[1]

3. Compliance with federal avocado size and weight regulations constitutes a condition precedent to the handling for sale of avocados grown in South Florida. 7 C.F.R. 915.61; 197 F. Supp. 780, 783. Commingled in the avocados tested in handlers' Exhibit 16 for identification were: (1) those picked in test orchards, and (2) avocados picked in commercial orchards. R 220-226. Since the fruit tested came direct from the orchard and not from handlers' packing houses, and since some of the fruit did not come from commercial orchards, the fruit tested was not representative of fruit which had been graded, sized and inspected at the packing house which handlers would actually ship to California. Low oil tests could easily be secured by simply supplying Mr. Harkness with small fruit which handlers could not have legally marketed under the federal weight and size marketing regulations, e.g., 19 F.R. 4404.

Further, the many oil tests made from July 6, 1953, through July 19, 1954, Pl. Ex. 16 for ident., R. 389

[1] State officers offered in the trial court to prove that the handlers' oil test method was inaccurate in that it (1) failed to recover substantial quantities of the available oil in the avocado fruit tested, and (2) produced materially erratic oil test results. R. 707-712. The trial court did not accept this tender of rebuttal evidence since handlers' depositions and attached exhibits were excluded from evidence. R. 782. However, the right to adduce this proof at a further hearing was reserved to state officers by the district court in the event that it was held on appeal that handlers' depositions and attached exhibits were erroneously excluded from evidence. R. 782; 197 F. Supp. 780, 782 fn. 2.

(O.P.); R. 576, 782, were made prior to the first federal size and weight shipping restriction issued effective July 26, 1954 (19 F.R. 4404) and are, therefore, irrelevant to any issue in the case. With respect to the avocados tested after July 19, 1954, only average weights for groups of five to nine are generally given, e.g., R. Pl. Ex. 16 for id., R. 413-416 (O.P.); R. 576, 782. (O.P.). Neither are the diameters of any individual fruit given. Thus it is impossible to ascertain from handlers' Exhibit 16 for identification whether any given fruit would have met the federal shipping restrictions. Similarly, there is no showing that the fruit tested met the federal requirement ". . . that the avocado has reached a state of growth which will insure a proper completion of the ripening process." R. 39, 19 F.R. 5440; 19 F.R. 6990; 19 F.R. 7263; 7 C.F.R. 51.3058. This defect is made apparent by an examination of page 28 of Exhibit 16 for identification. R. 427 (O.P.); R. 576, 782. The witness Harkness was asked: ". . . whether any of that fruit [listed on page 28] was covered by a Federal-State Inspection Certificate?"

"A. No, not when it was brought to us, that is, insofar as I know.

"Q. Then so far as you know it had never been inspected?

"A. That is right." R. 227 (O.P.).

Handlers' Exhibit 16 for identification is therefore irrelevant to the issues of the case since no showing was made that the avocados involved could have been

legally shipped from South Florida under federal law.

Plainly state officers' objections that the proffered document constituted inadmissible hearsay and is irrelevant to any issue in the case are well taken, and the district court properly excluded handlers' Exhibit 16 for identification from evidence.

C. HANDLERS' EXHIBITS 12 AND 13 FOR IDENTIFICATION WERE PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibits 12 and 13 for identification consist of excerpts from handlers' Exhibit 16 for identification, and a partial extract from unidentified regulations issued by the Secretary of Agriculture. R. 164, 165, 209-213 (O.P.); R. 576, 782 (O.P.). Handlers' witness Biggar, Manager of the Avocado Administrative Committee, as a personal favor to Harold E. Kendall and Fred Piowaty, officers of handler corporations, visited the University of Florida Sub-Tropical Experiment Station, Homestead, Florida, and copied onto Exhibits 12 and 13 for identification portions of the records he found there. R. 164-165 (O.P.). Kendall and Piowaty were members of the Avocado Administrative Committee. R. 191-192 (O.P.). The witness Biggar, at the time the exhibit was prepared, knew of the pendency of the lawsuit and that the exhibit could be used as an exhibit in said action by handlers. R. 172-173 (O.P.). Biggar admitted that he had no personal knowledge of the information he copied onto Exhibits 12 and 13 for identification. R. 171-172 (O.P.).

State officers objected to the introduction into evidence of handlers' Exhibits 12 and 13 for identification on the grounds (1) that the information pertaining to oil tests is derived from Exhibit 16 for identification, said Exhibit 16 being inadmissible hearsay, (2) that those portions of Exhibits 12 and 13 for identification which identifies the person making the request for oil content testing, and identifying the owner of the avocado grove concerned, constitutes inadmissible hearsay, and (3) that the lower portion of the exhibit constitutes inadmissible secondary evidence of the contents of the unidentified federal regulations. R. 717-719.

Handlers' witness Harold E. Kendall, on cross-examination, admitted that he had never personally delivered any of the avocados listed on Exhibit 13 for identification to the Sub-Tropical Experiment Station. R. 275-276 (O.P.). His personal involvement was the giving of instructions to handler South Florida Growers', Inc., field superintendent, that sample avocados be picked and delivered to the experiment station. R. 276 (O.P.). The testimony of Kendall is the only testimony connecting handler South Florida Growers, Inc., with Exhibit 13 for identification, other than the hearsay statements of Biggar. R. 164. Since Kendall's testimony in this regard is not based on personal knowledge, he is not qualified as a witness to testify thereon. Exhibit 13 for identification therefore constitutes inadmissible hearsay since its contents are

identified only through the hearsay testimony of Kendall and Biggar.

Handlers' witness Fred Piowaty on cross-examination similarly admitted that he had never personally delivered any of the avocados listed on Exhibit 12 to the Sub-Tropical Experiment Station. R. 326-327 (O.P.). Nor had he personally picked any of the fruit. R. 327 (O.P.). Thus, Piowaty had no personal knowledge of the facts recited in Exhibit 12, and his testimony constitutes inadmissible hearsay. Since Exhibit 12 for identification rests on the hearsay testimony of Biggar and Piowaty, it too constitutes inadmissible hearsay.

It is plain that Exhibits 12 and 13 for identification are extrajudicial writings which are offered to prove the truth of the matters asserted. As such, they constitute inadmissible hearsay. The testimony of Biggar, the person preparing the document, shows that it was not prepared in the course of the business of the Avocado Administrative Committee, but as a personal favor to handlers. R. 170 (O.P.). The title and form of these documents show that they were prepared for litigation and not in the course of business. Pl. Ex. 12 and 13 for Id., R. 371, 375 (O.P.); R. 576, 782. They are therefore not admissible in evidence as business records. *Palmer* v. *Hoffman*, 318 U.S. 109, 114 (1943).

These portions of Exhibits 12 and 13 for identification which purport to identify the person making the request for oil content testing, and which purport

to identify the grove where the avocados were picked, constitute inadmissible hearsay. Biggar was not the declarant since he merely copied this information from records he found in the office of Harkness. R. 164 (O.P.). He had no personal knowledge of these facts. R. 170-172 (O.P.). Similarly, Harkness was not the declarant since his knowledge was derived from the hearsay statements of the persons bringing fruit from correncial groves to him for testing. R. 220-224 (O.P.). Objection was also made to those portions of Exhibits 12 and 13 for identification which purport to be summaries of federal regulations. R. 717-718. These federal regulations are not identified and not authenticated, and no foundation was laid showing the accuracy of these summaries. These portions of the exhibit, therefore, also constitute inadmissible hearsay.

D. HANDLERS' EXHIBITS 4, 5, 7, 8, 10 AND 11 FOR IDENTIFICATION WERE PROPERLY EXCLUDED FROM EVIDENCE.

State officers objected to the introduction into evidence of handlers' Exhibits 4, 5, 7, 8, 10 and 11 for identification on the grounds that such exhibits constitute (1) inadmissible secondary evidence of the contents of other written documents not produced in court, (2) are not the best evidence of the contents of such other documents, (3) are inadmissible summaries, and (4) are inadmissible hearsay. R. 713-717.

Handlers' witness Biggar was the only one who testified regarding out-of-court preparation of these documents. Since they are offered in evidence by

handlers to prove the truth of the matter asserted, they constitute hearsay. Analysis shows them to constitute inadmissible hearsay. Further, the exhibits purport to show the volume of avocado shipments from both California and Florida for the years 1955, 1956 and 1957. The relief sought by handlers is a prospective-looking injunction and the relevance of this information dealing with past years is not articulated by handlers.

Biggar testified that he had prepared Exhibit 4 for identification from information set forth in inspection certificates supplied him by a third person, supposedly the federal-state inspection service. R. 168-169 (O.P.). The declarant therefore was not Biggar but the person who made the certificates. These certificates were never produced by handlers for state officers' inspection. Neither was a foundation laid showing their authenticity or mode of preparation, the witness having no personal knowledge of these facts. R. 169 (O.P.). State officers have never been given the opportunity to cross-examine the declarants of these extrajudicial hearsay statements set forth in Exhibit 4 for identification. This exhibit was therefore properly excluded from evidence.

The information set forth in handlers' Exhibit 5 for identification as prepared by Biggar, came from a letter never produced by handlers, from the Federal Department of Agriculture and from estimates supplied by Calavo Growers of California, a private marketing co-operative. R. 153-154 (O.P.). As in the case

of Exhibit 4 for identification, state officers have never been given the opportunity of cross-examining the declarants of these extrajudicial hearsay statements. This exhibit, therefore, constitutes an inadmissible hearsay summary of the contents of other hearsay documents.

Exhibit 7 for identification purports to list by variety and by week for the period June 1, 1956 to March 31, 1957, the quantities of avocados shipped from South Florida. R. 361 (O.P.); R. 576, 782 (O.P.). But the witness Biggar was not the declarant since he had no personal knowledge of the origin of these figures. R. 169 (O.P.). For the figures shown on lines 1 to 13 of the exhibit, the witness relied on certificates of inspection furnished him by the federal-state inspection service, and for the figures shown on lines 13 to 40, he relied upon reports supplied to him by Florida shippers of the fruit. R. 169 (O.P.). Neither the certificates of inspection, nor the reports of the private shippers, have been made available to state officers. Neither have the faceless declarants who made these extrajudicial reports been made available for cross-examination. Plainly, therefore, Exhibit 7 for identification was properly excluded from evidence as inadmissible hearsay.

Exhibit 8 for identification was prepared by the witness Biggar and purports to show California, Cuba and Florida shipments of avocados by week from April 2, 1955, through March 31, 1957. R. 169 (O.P.). The declarant was not Biggar, who had no personal

knowledge of the facts reflected in this document, but who instead relied on estimates supplied by a California avocado marketing corporation, from certificates of inspection made by the federal-state inspection service and by "unpublished U.S.D.A. records." Pl. Ex. 8 for Id., R. 363 (O.P.); R. 576, 782; R. 169 (O.P.); R. 674. This exhibit, therefore, also constitutes inadmissible hearsay matter, and was properly excluded from evidence.

Handlers' Exhibits 10 and 11 for identification purport to list avocado shipments from South Florida by week for the period April 1, 1957, through January 11, 1958. Pl. Ex. 11 and 12 for Id., R. 370, 371 (O.P.); R. 576, 782. These documents were made by handlers' witness Biggar from information set forth in certificates of inspection furnished to him by the federal-state inspection service. R. 161-163 (O.P.). The declarant of these extrajudicial statements was not Biggar, who had no first-hand knowledge of the facts recited, but rather were the unidentified persons who made out the original certificates. Exhibits 10 and 11 for identification, therefore, constitute inadmissible hearsay matters and were correctly excluded from evidence.

But, claims handlers, Exhibits 4, 5, 7, 8, 10 and 11 for identification come within the official records exception to the hearsay evidence rule under 28 U.S.C. 1733. This statute provides:

> "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act,

transaction or occurrence as a memorandum of which the same were made or kept.

"(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

However, the Avocado Administrative Committee is not a federal agency within this statute. The committee consists of nine members selected by the Secretary of Agriculture. 7 C.F.R. 915.20. Five are producers of Florida avocados and four are handlers of Florida avocados. 7 C.F.R. 915.20. Their primary function is to recommend proposed administrative regulations to the federal Secretary of Agriculture. 7 C.F.R. 915.50. The committee represents and acts on behalf of the Florida avocado industry, not the federal government. R. 599-600. Its records therefore are not official records within 28 U.S.C. 1733.

In addition, the presumption of impartiality attendant to official records is lacking here. The summaries were prepared by the witness Biggar, a pleasure employee of the administrative committee. R. 192 (O.P.). The committee itself is composed of growers and handlers of Florida avocados. 7 C.F.R. 915.20. Among these members were Harold Kendall and Fred Piowaty. R. 191-192 (O.P.). These men are officers in the plaintiff corporations in this case and testified for handlers. R. 251, 314 (O.P.). Under these circumstances the bias of the witness Biggar casts

shadows on the reliability of the exhibits prepared by him. These exhibits, therefore, cannot reasonably have the indicia of reliability and impartiality required under 28 U.S.C. 1733.

E. HANDLERS' EXHIBITS 6, 9 AND 14 FOR IDENTIFICATION WERE PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibits 6, 9 and 14 for identification consist of summaries of federal regulations issued successively during the 1956-1957, 1957-1958 Florida avocado shipping seasons. R. 359, 364, 379 (O.P.); R. 576, 782 (O.P.). These summaries were prepared by the witness David M. Biggar, a pleasure employee of the Avocado Administrative Committee. R. 192 (O.P.).

State officers objected to the admission into evidence of the exhibits on the grounds (1) the exhibits constitute inadmissible secondary evidence of the contents of the original regulations, and are not the best of evidence of such contents, (2) constitute inadmissible hearsay, (3) the exhibits do not constitute a written verbatim copy of the original regulations, and (4) there has been no authentication of the original regulations. R. 717.

Presumably, the original federal regulations, or authenticated copies, are available to handlers. Since production is thus feasible, it should be required since every word and every part in the whole should be compared before a court determines the total sense and effect that should be given it.

Handlers, of course, may make appropriate reference to the regulations of the Secretary of Agriculture which are published in the Federal Register. This circumstance renders formal proof of the contents of the regulations unnecessary. This taking of judicial notice re-enforces state officers' argument that handlers' Exhibits 6, 9 and 14 for identification constitute inadmissible hearsay summaries of the regulations in question, and should not be admitted into evidence, since alternative proof is available.

F. HANDLERS' EXHIBIT 15 FOR IDENTIFICATION WAS PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibit 15 for identification consists of bulletins issued by the Avocado Administrative Committee from May 15, 1957 to October 9, 1957. The bulletins relate recommendations made by the committee to the Federal Secretary of Agriculture. As recommendations, the bulletins are irrelevant. If tendered to prove the contents of the actual regulations, the exhibits are inadmissible secondary evidence since the regulations themselves are the best evidence of their contents. The exhibits are similarly inadmissible if considered as summaries of federal regulations (otherwise not identified) since they would then constitute inadmissible secondary evidence of the contents of the regulations. R. 719.

G. HANDLERS' EXHIBIT 22 FOR IDENTIFICATION WAS PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibit 22 for identification is an unauthenticated document with the heading "Los Angeles

County Agricultural Commissioner." State officers object to the introduction of the exhibit in evidence on the grounds that (1) its authenticity has not been shown, and (2) the document constitutes inadmissible hearsay. R. 721-722.

The only testimony regarding Exhibit 22 for identification is that of witness Piowaty, Secretary of handler Florida Lime and Avocado Growers, Inc. R. 314 (O.P.). Piowaty testified (1) that the exhibit had been procured by his "consignee in Los Angeles," and (2) that it contained a memorandum of oil tests. R. 320 (O.P.). No showing is made either establishing the authenticity of the document or identifying who made the entries thereon. Without such foundation, Exhibit 22 for identification is inadmissible hearsay. Similarly, the witness is not the declarant since he had first-hand knowledge of the transactions reflected in the exhibit. The witness is therefore not privileged to testify regarding the transaction, and his statements constitute inadmissible hearsay.

H. HANDLERS' EXHIBITS 23, 24, 25 AND 26 FOR IDENTIFICATION WERE PROPERLY EXCLUDED FROM EVIDENCE.

Handlers' Exhibits 23, 24, 25 and 26 for identification consist of a number of treatises and one chart. R. 446-486 (O.P.).

Exhibit 23 for identification consists of:

(1) Typewritten pages entitled, "General Information on Avocado Research."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. 67, 1954, entitled,

"The Relation of Maturity to Quality in Florida Avocados."

(3) A collection of writings headed, "Evidence Presented at Hearings Before Secretary of Agriculture," March 8, 1954, by Paul L. Harding. R. R. 446-467 (O.P.).

Exhibit 24 for identification consists of:

(1) Typewritten pages entitled, "General Information on Avocado Research, 1954-1955."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. 68, 1955, entitled, "Relation of Maturity of Florida Avocados to Physical Characters." R. 472-477 (O.P.).

Exhibit 25 for identification consists of:

(1) Typewritten pages entitled, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados."

(2) A reprint from Proceedings of the Florida State Horticultural Society, Vol. LXX, 1957, entitled, "Relation of Maturity to Certain Chemical and Physical Characters in Florida Avocados."

(3) Chart headed, "Some Physical and Chemical Changes in the Principal Varieties of Florida Avocados Picked Above and Below the Regulated Minimum Weight, 1955-1956." R. 478-486 (O.P.).

Exhibit 26 for identification consists of typewritten pages entitled, "Résumé of Progress of Studies on Florida Maturity," by Thurman T. Hatton, Jr. R. 486 (O.P.).

At the trial handlers objected to the introduction into evidence of these exhibits on the grounds that

they constituted (1) inadmissible hearsay, (2) inadmissible secondary evidence of the contents of other writings, and (3) are irrelevant. R. 722. These exhibits were identified as "part of the records of the United States Department of Agriculture." R. 583. But no foundation was laid showing the source or accuracy of the opinions expressed in these obviously *ex parte* investigations. State officers could not cross-examine these exhibits, nor could they cross-examine the witness Harding because he was not the declarant, there being no showing that he possessed firsthand knowledge of the facts. As the product of research, they are controversial and do not reflect the day-to-day operations of the federal government. These exhibits, therefore, were correctly excluded from evidence. *United States* v. *International Harvester Co.*, 274 U.S. 693, 703 (1927); *Hegler* v. *Faulkner*, 153 U.S. 109, 117-118 (1894). Further, the research work on avocados shown in this material is not relevant to any of the issues in this case since state officers do not attack the validity of the federal avocado regulations.